

HUMAN RIGHTS QUESTIONS: FROM BIOETHICS TO BIOLAW

Aurora Ciucă¹

Bioethics is a pluridisciplinary activity destined to clarify and solve actual ethical problems generated by science and bio-medical technologies. Bioethics is not a new science, a new ethics but a new border activity with the present day ideologies, with philosophy, theology and law.

Two phenomenons are at the basis of bioethics, a positive one and a negative one. On one hand, abuses of biomedical “research” on human beings during the Second World War (and after) such as genocide crimes in the name of humanity, the ill-fated experiment of thalidomide etc. On the other hand, bioethics is a result of the huge progress of the life sciences. The knowledge, the science has not a normative character or ethical messages and does not distinguish the good from the bad (as A. Huxley said in “Brave New World”). The value of scientific discoveries remains to be attested by the ethics. For this reason the United Nations, the Council of Europe and other international organizations have adopted resolutions, declarations, asking : the flexibility of law in order to control the scientific progress; the science to serve human integrity and dignity; science to have a human sense since the sense of life consist in human values.

Bioethics is a bridge between science and Human Rights. Human rights proclaim the priority of human being over the social interest, of the individual over the community needs. But the research should respect the human being. The right to life and the right to health represent the nucleus of human rights and through this they become imperative and their limitations must be legitimated by law.

Human rights allow to individuals to judge the quality of their life since the states cannot impose a unique conception about existence. The human being cannot give up their rights in the name of respect to life but can dispose freely of his/her body as a consequence of liberty of conscience.

Of course, it is not our aim to make an exhaustive presentation of bioethical problems. We can take in view only few examples of ethical questions that ask a legal answer. The medical assisted reproduction with in vitro fertilization and surrogate motherhood is one of them. There is already a generalized medical practice in this sense but the question is if the doctors act in the child’ interest or in that of the future parents who want to be necessarily biologic parents? How could we consider a surrogate motherhood contract as being legal since it is clear that a woman borrow her womb as part of her body? A surrogate maternity could be a humanitarian act when there is not financial profit involved. Another question is: how many parents (mothers, in fact) will have a child born as a result of this practice? In which way a judge will pronounce a sentence in such a case when a surrogate mother refuse to give, or to transfer (!?) the child to the would-be parents because of her maternal instinct?

The assisted reproduction helps the need to procreate in conditions of infertility. What about the abuses like the doctor who inseminates 200 women with his semen?

There is also the sharp controversy on euthanasia which divided the world in two opposed camps: those who are partisans of life’s dignity and ask the legalization and those who invoke the right to life and the interdiction to decide when to finish it? Could the reality of the evolution of a

¹ Professor Aurora Ciucă, Ph.D., is the Dean of the Faculty of Law at "Mihail Kogălniceanu" University, Iași, Romania

Contact: Tel. +40 232 212416; + 40 724 073397; Fax +40 232 279821;

aurora_ciuca_2000@yahoo.com

disease over-take the compassion or the necessity of preserving life is over the spirit's measure? Asking to die in dignity many people make their "biological will" in order to avoid, in advance, any therapy, helpless suffering or a degrading dependence².

We can add the problems issued by the organs transplantation, by the genetically test practice, the genetic therapy. Bioethics will always ask if everything is possible but if it is all possible is it also desirable?³

There is a gap between the scientific and medical progress and the law, which cannot offer immediate answers to many questions. Here begin the role of Biolaw, as a law that have to legislate in the bioethics' area.

On the European arena has been adopted (in April 1997) the Convention for the Protection of Human Rights and of the Human Being with regard to the Application of Biology and Medicine which reflect the concern on ethical and social problems. The supreme value that becomes the principle of the common project of the states is human being's dignity (beside the principles of autonomy, integrity and vulnerability).

On the basis of the convention, member states begun to adopt national laws concerning the assisted reproduction, the organ's transplantation, the transsexualism, euthanasia, genetic tests and therapies etc. What we can observe is a huge difference between the states laws since the convention cannot cover all practical aspects of bioethics which the states are confronted with and it rather establish minimal standards but cannot assure the homogeneousness. Taking in consideration the same examples of assisted reproduction and euthanasia we can read different European laws.

France affirms that the embryo is a virtual person and consequently the French jurisprudence does recognize the embryo's rights. The State Council has admitted that the right to life regards also the embryo. On the other hand, the problem of non-implanted embryos remains open since they and their rights to life are not protected. The Health Public Code does not allow in vitro fertilization and experiments on the embryos.

Germany has a law on embryo's protection that establish who can be the beneficiary of the medical assisted reproduction: a married couple, a couple in civil union or a woman who's husband lack reproductive capacity. At the same time the donor should agree the use of his body's product and to accept that the child born in such a way has only two parents.

In Spain a law adopted in 1998 allows the post-mortem fecundation in six months after death if the consent of the death husband could be proved.

Euthanasia was legalized in Albania in 1999. Passive euthanasia is considered legal if three or more family members consent to the decision. Albania's euthanasia policy has been controversial among life groups and the Catholic Church, but due to other more prominent countries also legalizing forms of euthanasia, it has meant a more relaxed world attitude to the matter.

The Belgian Parliament legalized euthanasia in late September 2002. Proponents of euthanasia state that prior to the law, several thousand illegal acts of euthanasia were carried out in Belgium each year. According to proponents, the legislation incorporated a complicated process, which has been criticized as an attempt to establish a "bureaucracy of death".

In Luxembourg, the Parliament passed a bill legalizing euthanasia on February 20, 2008 in the first reading with 30 of 59 votes in favor. It still has to pass a second reading before coming into effect. Euthanasia would be allowed for the terminal ill and those with incurable diseases or

² Bioéthique et droit international. Autour de la Déclaration universelle sur la bioéthique et les droits de l'homme, sous la direction de Christian Byk, Paris : LexisNexis, Litec, 2007, p. 10.

³ G. Scripcaru, Bioethics between life's sciences and Human Rights, Romanian Review of Bioethics, Vol. 1, nr. 2, 2003, p. 37.

conditions only when they asked to die repeatedly and with the consent of two doctors and a panel of experts.

The Netherlands legalized euthanasia including physician assisted suicide. The law codified a twenty year old convention of not prosecuting doctors who have committed euthanasia in very specific cases under very specific circumstances. The Ministry of Health claims this practice allows a person to end the life in dignity after having received every available type of palliative care.

In Switzerland, deadly drugs may be prescribed to a Swiss person or to a foreigner, where the recipient takes an active role in the drug administration. More generally, article 115 of the Swiss penal code considers assisting suicide a crime if and only if the motive is selfish. The code does not give physicians a special status in assisting suicide; however, they are most likely to have access to suitable drugs. Ethical guidelines have cautioned physicians against prescribing deadly drugs. However, they also recognize that in exceptional, and defined, cases physicians may justifiably assist suicide. When an assisted suicide is declared, a police inquiry may be started. Since no crime has been committed in the absence of a selfish motive, these are mostly open and shut cases. Article 115 was only interpreted as legal permission to set up organizations administering life-ending medicine in the 1980s, 40 years after its introduction. These organizations have been widely used by foreigners (most notably Germans) as well as the Swiss.

As we can see states have different juridical solutions to bioethical problems. One of them have a prohibitive approach, others are very cautious and others are not answering at all. Beside the need to adapt the law at the requirements of scientific progress they have to take into consideration religious, cultural, traditional influences or political aspects. The mentality and the degree of public opinion's implication or of population's information have also a certain weight. The European Union as an organization with specific features and powers try to "delete" through a specific legislation those differences between states and to reach a uniformization of biolaw but this project is still difficult.

REFERENCES

- Bioéthique et droit international. Autour de la Déclaration universelle sur la bioéthique et les droits de l'homme, sous la direction de Christian Byk, Paris : LexisNexis, Litec, 2007
- Ghe. Scripcaru, Bioethics between life's sciences and Human Rights, Romanian Review of Bioethics, Vol. 1, nr. 2, 2003.